Supreme Court, U.S.
FILED
OCT 15 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 206

VIVEN HARRIS,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

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Question Presented

Whether in a trial held after *Miranda* v. *Arizona*, the prosecution may impeach the credibility of a defendant who has affirmatively resorted to perjury, with a pre-*Miranda* statement that is not available as direct evidence of guilt.

Interest of *Amicus*

Amicus is the District Attorney of New York County, the authorized law officer of a political subdivision of the State of New York. *Amicus* files this brief in support of an affirmance of petitioner's conviction because the issue presented involves the integrity of the jury's function as a fact-finding body in criminal trials. The decision of the court below safeguards that function. A rejection of the New York rule will not only encourage defendants to commit perjury, it will cripple the jury's ability to arrive at a reliable assessment of a defendant's credibility. It would be wrong to permit a defendant to exploit a constitutional benefit as a shield behind which to mislead the jury as to the truth, particularly where, as in petitioner's case, the incriminating statement was obtained lawfully under standards deemed constitutional at the time of the questioning. Because of our concern that this Court reaffirm its decision in *Walder* v. *United States,* 347 U.S. 62, condemning a defendant's resort to perjury, we submit our brief as *amicus curiae* in support of the decision below.

Statement of the Case

The petitioner, Viven Harris, was tried in the County Court of Westchester County, New York, on an indictment charging him with twice selling a narcotic drug, heroin, to an undercover police officer, Detective George Bermudez. The petitioner was convicted, after a two-week trial (DEMPSEY, J. and a jury), of having sold narcotics on January 6, 1966, the second count in the indictment. The

jury were unable to agree upon a verdict under the first count, charging that petitioner had sold heroin on January 4, 1966. Petitioner was sentenced on December 20, 1966, to State Prison for a term of not less than six years nor more than eight years.

At the trial Detective **George Bermudez** testified for the People that he is assigned to the Narcotics Bureau of the New York City Police Department and, as part of his assignment, he has worked in an undercover capacity for the past 10 years (83-6).* In early December, 1965, Bermudez and his partner, Richard Parks, met with Edward Carey, Commissioner of the New Rochelle Police Department, who had formerly been the Chief Inspector in Charge of the New York City Police Department's Narcotic Bureau and Detective Bermudez's boss in New York City (88-90). As a result of that meeting, Bermudez and Parks commenced an investigation on December 6, 1965 into the illicit narcotic drug activity in the city of New Rochelle. For the purposes of the investigation, Bermudez assumed the name Joseph Vegas and Parks the name Eddie Que (90).

During the course of this investigation, Detective Bermudez was introduced to the petitioner Viven Harris, on January 4, 1966 at approximately 6:30 p.m., inside the Three-Fours Bar and Grill. Bermudez and Parks were sitting with some friends, acquired during the investigation, when Harris approached one of the group with an offer to sell a guitar. The man said, no, and pointed to

* Numerical references are to pages of the typewritten record of the trial, which was reviewed by the Court of Appeals and is before this Court, having been transmitted by the Clerk of the Supreme Court, Westchester County.

Bermudez, who then expressed interest. Harris explained that he had just gotten an electric guitar and was willing to let Bermudez have it, as well as its case, for $35. Bermudez instructed Parks to go with Harris and inspect the guitar. After waiting ten minutes for the two men to return, Bermudez and his friends left the bar. As they crossed the street, however, Parks and Harris reappeared. Parks reported that the guitar was only worth $25. Bermudez told Harris that he had to go some place, but would return immediately and would then like to inspect the guitar for himself. Harris expressed great reluctance about waiting; he said he was in a hurry, that he had to "go downtown and score a half-a-load"—a vernacular expression meaning to purchase 15 decks of heroin. Eventually, however, Harris agreed to await Bermudez's return and they arranged to meet in a laundromat (90-5). Harris, however, was not at the laundromat when Bermudez returned and Bermudez, rather than wait for him, went back to the Three-Fours Bar and rejoined Parks.

An hour later, Harris entered the bar, approached Bermudez and asked what had happened. Bermudez protested that he had kept the appointment, to which Harris responded, "I told you I had to go downtown to get a couple of half-loads." When Bermudez again expressed interest in the guitar, however, Harris said that it was in his home and that he would take Bermudez to see it. The two men then left the bar and drove in Bermudez's car, to Harris's apartment (95).

En route to the apartment, Bermudez asked Harris "What was happening?" meaning, do you have any heroin. Harris replied by asking Bermudez what he wanted, and

Bermudez said he would take a half-a-load. Harris, explaining that he had been out of action for a while and had only just started again, said, "I can't let you have a half-a-load unless I speak to my partner Al Payne," but offered to let Bermudez have a "bag." Bermudez said, "All right, we'll talk to Al" (95-6).

When they arrived at the house, Harris brought Bermudez into the apartment and showed him the guitar. After some haggling over the price, Harris agreed to sell the guitar for $25 and Bermudez handed him a twenty-dollar bill and a ten-dollar bill. Harris pocketed the money without giving Bermudez his change (97).

Downstairs, Bermudez stored the guitar in the trunk of his car, then the two men walked around the corner to a poolroom where they found Al Payne (97-8). Harris told Payne that Bermudez wanted a half-a-load and was willing to pay $35 for it. Bermudez immediately said "hold it," $35 was too much, he would not pay more than $30. After a brief argument over the price, Payne said, "Listen, hey, forget about it," and walked back into the poolroom (98). Bermudez and Harris then returned to the car. On their way, Harris explained that he could not sell Bermudez a half-a-load for less than $35 without losing money, but that he would let Bermudez have one bag for $7. Bermudez again balked at the price and Harris finally agreed to let him have one bag of heroin for $5. Telling Bermudez to wait downstairs by the car, Harris went upstairs to his apartment. A few minutes later, Harris emerged from the building and handed Bermudez a glassine envelope containing a white powder (98-100). Bermudez

placed the envelope in his pocket and drove back to where he had left Detective Parks and his other companions. After standing around for awhile, he and Detective Parks drove to a pre-arranged location, where Bermudez signed and sealed the glassine envelope. Later, this envelope was delivered to the police laboratory (99-101, 112-17; Exh. 2), where it was chemically analyzed by Detective **Frank Schurr**. The analysis revealed that heroin was present in the glassine envelope (279-85).

Two days later, on January 6, 1966, Bermudez saw Harris again. At approximately 8:25 p.m., Harris entered the Three-Fours Bar and walked over to Bermudez. Harris inquired, "What's happening?" and Bermudez said, "Nothing, it's quiet." They spoke in general terms about a mutual acquaintance who was getting established, and then Harris asked if Bermudez wanted anything. Bermudez said, "Yes," that he would like "a couple of bags." A brief argument over the price followed, Harris asking for $7 and Bermudez refusing to pay that much. Finally, Bermudez said he would go as high as $6, but no higher. Harris agreed and, after telling Bermudez to wait for him because he had to go back to his apartment, Harris left the bar (117-19).

When Harris returned, approximately twenty minutes later, he again approached Bermudez and said, "Look, I want to talk to you, Joe. Come on outside." Bermudez followed Harris outside and the two men got into Detective Bermudez's car, which was parked in front of the bar. Harris handed over two glassine envelopes and Bermudez paid him $12. After a brief conversation, during which Harris tried to solicit Bermudez to sell

narcotics in New Jersey for Harris's organization, the two men got out of the automobile and returned to the bar (119-23). Later, Detectives Bermudez and Parks left the Three-Fours Bar and drove to a pre-arranged location, where Detective Bermudez signed and sealed the glassine envelopes. Subsequently, Detective Bermudez delivered the two glassine envelopes to the police laboratory for analysis (122-6, 128-9; Exh. 4). The chemical analysis, performed by Detective **Schurr**, revealed that heroin was present in each of the two glassine envelopes (285-90).

The next day, January 7, Detective Bermudez saw Harris on Lincoln Avenue and invited him into the car. Harris accepted and, after they had driven down the Boulevard, Detective Bermudez informed Harris that he was a police officer and that Harris was under arrest for violation of Section 1751 of the [former New York] Penal Law. Harris was then turned over to the New Rochelle police (131-2).

On cross-examination, Detective Bermudez testified that there was no "panic" in New Rochelle during December, 1965, and January, 1966. "Panic" means that you cannot get any heroin at all, that it is in short supply, there is a shortage of drugs on the market (238).

Detective **Richard Parks** of the Narcotics Bureau of the New York City Police Department testified that for the purpose of this investigation he assumed the name of Eddie Que (314-18). He met Viven Harris for the first time during the early evening of January 4, 1966, in the Three-Fours Bar and Grill in New Rochelle. A little later that evening, Detective Parks had a conversation with Harris

about a guitar. Bermudez instructed Parks to accompany Harris to the latter's apartment and look at the guitar in order to estimate its value. Parks did so, then returned to the bar where he met his partner, Detective Bermudez, who was using the name Joe Vargus (318-21, 329-30). They met outside the bar at Bermudez's car. As he and Bermudez entered the car, Harris asked Bermudez if he wanted the guitar. Bermudez replied that they had to attend to something and Harris said that he also had to leave, he had to go downtown to cop a half-load. However, he agreed at Bermudez's request, to await their return and said he would meet Bermudez in the laundry (321-2).

Detective Parks next saw Harris at approximately 8 p.m. that evening. Harris entered the Three-Fours Bar and had a conversation with Detective Bermudez. Detective Parks was not close enough to overhear what the two men were saying. Harris left the bar, only to return a little while later. Then he and Detective Bermudez left together (320, 322). Twenty-five minutes later, Detective Bermudez returned to the bar (322).

Detective Parks did not see Harris again until January 6, 1966, two days later. It was approximately 8 p.m. and Harris was inside the Three-Fours Bar and Grill in the company of Detective Bermudez. Harris left the bar and returned. Next, Detective Parks observed Harris and Detective Bermudez enter the latter's car, which was parked in front of the bar. Parks watched as the two men spoke and moved toward each other, then went back inside the bar (323-4). A few minutes later, Detective Bermudez reentered the bar (324). An hour later, Detectives Bermudez and Parks left the bar and drove to a specific location where

Detective Parks initialed the tape placed by Detective Bermudez on People's Exhibit 4, the glassine envelopes (324-5).

The petitioner, **Viven Harris**, called as a witness on his own behalf, testified that the first time he had seen Detective Bermudez was in mid-December, 1965 on Sickles Avenue in New Rochelle. They did not speak to one another on that occasion (391). Harris, Al Payne, also known as Alvin Miller, and another friend, Ambrose Rooney, were standing on Sickles Avenue trying to scrape up enough money to buy one bag of heroin for the three of them when Bermudez drove up in a car with Ronnie Sykes and Detective Parks. Bermudez asked Ronnie to ask Harris and his friends to see if they could "cop a bag of drugs" for him and one of them did. Bermudez gave Ronnie Stykes the money, seven dollars, to give to Ambrose; Harris's friends had seven dollars to obtain a bag of drugs for themselves. Harris and his friends went to a house on Sickles Avenue, number 108, and spoke to the Spanish boy, Joe, who answered the door. Joe told them that he had respectable people living there and not to make too much noise if they entered the house. After buying two bags of heroin, they took some of the powder out of Bermudez's envelope and put it in their own bag, "so it would be more for us and less for him." They left the house and handed the bag to Ronnie Sykes, who in turn handed it to Bermudez. Bermudez, Ronnie, and Detective Parks then drove away (396-9).

Harris did not actually meet Detective Bermudez until the early evening of January 4, 1966. Bermudez was sitting in the Three-Fours Bar and Grill with Charlie and Ronnie, who introduced him to Harris as "Joe" (390-2).

They spoke but did not discuss narcotics. About half an hour later, Detective Bermudez asked Harris to go and see if he could obtain a bag of drugs for him. Harris told him that there was a panic on, that he wanted drugs for himself, but that drugs could not be found anywhere. Harris, a drug user since 1961, added that he himself was drinking Robitussin A.C.—a cough syrup containing codeine. Bermudez kept asking and asking, but Harris kept saying that "we couldn't buy no drugs because it was a panic on, it wasn't no drugs to be found," because he needed them for himself (392-5). After a little small talk, and after Detective Bermudez had bought him a beer, Harris left the Three-Fours and went to another bar. He never bought drugs for Bermudez (396).

Harris again saw Detective Bermudez on January 6, 1966, in the Three-Fours Bar. Charlie and Detective Parks were there but they were not sitting with Bermudez (399-402). Bermudez wanted Harris to see if he could buy him a half-a-load of drugs. Harris replied that there was a panic on and drugs could not be bought. Next Bermudez asked, "Could you buy me two bags of drugs?" and again Harris told him there was a panic on (402). Then a friend of Harris's, Henry Stanley, entered the bar and began speaking to Harris. Bermudez asked Stanley if he was "a friend of Viven?" Learning that he was, Bermudez said, "Well, birds of a feather flock together. You know where you can get some drugs at?" Stanley confirmed what Harris had already told Bermudez, there was a panic on and he was drinking terpin hydrate and Robitussin A.C. (402-3). When Bermudez kept asking and insisting, Stanley punched Harris in the side—indicating that he wanted to speak to him privately. The two men spoke together

and then, as a result of that conversation, they left the bar and went to Stanley's house (403-5). Because they believed that Detective Bermudez snorted heroin, Harris and Stanley mixed a baby formula with milk and snorted the combined substance. The mixture did not have any sting, so they tried baking powder. Baking powder, they discovered, had just the right amount of sting to initially deceive a "snorter" and they placed some in two empty glassine envelopes that Stanley "had used the heroin from." The envelopes did not contain any heroin, they were totally empty before the baking powder was placed in them (405-7, 409). Then they returned to the Three-Fours Bar and gave the two glassine envelopes to Bermudez. Harris did not have a conversation with Bermudez at that time (407). They asked Bermudez to buy them a beer and he did so. While they were having their beer, they told Bermudez that the drugs they had given him was the best they could do and might be a little light. When they had finished their beers, Stanley and Harris left for New York to buy themselves some heroin (408-9). On the next occasion when he saw Detective Bermudez, Harris was placed under arrest (409).

Harris further testified that he did not sell any drugs to Detective Bermudez, he had never sold drugs to anyone, and he never had a partnership or business arrangement with Al Payne. He had given drugs to someone, but he did not give any drugs to anyone on January 4, 1966, or on January 6, 1966 (410). He has never discussed drugs with strangers (412).

During the cross-examination of petitioner, the trial court, applying the decision of the New York Court of

Appeals in *People* v. *Kulis*, 18 N.Y.2d 318 (1966), permitted the prosecutor to confront petitioner with a prior inconsistent statement taken on January 7, 1966, shortly after he was arrested (445-8; A 56-7).* In substance, that portion of the question-and-answer statement which was read to petitioner contained a truthful, though undetailed, account of the sale on January 4th. In that statement Harris had admitted driving with Bermudez to get a single glassine envelope of heroin, that Bermudez had known where to go, that Harris had entered the location, which he denied was his own home, that he had remained a total of two minutes, and had returned with a five-dollar bag of heroin which he had given to Bermudez and that the drug had been paid for by Bermudez (448-52; A 57-60). Concerning the events of January 6th, the question-and-answer statement was false. Harris had said that while in the Three-Fours Bar and Grill Bermudez had asked Harris to buy drugs for him, that Harris had walked outside of the bar where he met a boy from whom he bought two five-dollar bags of heroin for Bermudez, that he had reentered the bar and handed the narcotics to Bermudez who had given him twelve dollars and half of the heroin in one of the envelopes (452-6; A 60-3). Both the truthful account of January 4th and the false account of January 6th, conflicted with petitioner's trial testimony. When confronted with his earlier statement, petitioner testified that he was unable to recall being asked any of the questions or giving any of the answers contained in it (449-56; A 58-63). Petitioner attributed this lapse of memory to a "slight concussion" he had sustained

* Numerical references preceded by the letter "A" are to pages of the printed appendix filed by petitioner in this Court. Petitioner's question-and-answer statement (Exh. 6 for ident.) is to be found in his appendix at pages A72 to A78.

four years earlier (458-9; A 64). The prosecutor did not inquire further and the statement was not introduced in evidence.

The petitioner's claim that he could not remember either the questions or the answers left open the question whether he was affirming or denying the existence of the statement. That question was answered by defense counsel in his summation when he conceded that the questions and answers as put to the petitioner in cross-examination accurately reflected the prior statement (501). And defense counsel advised the jury that the court would, as earlier announced (457; A63), instruct them that "any prior statement made by the defendant, presented here in the Courtroom inconsistent with his testimony, can be considered by you only for the purpose of determining how much credibility, how much weight you are going to give his testimony, that it's not independent, separate proof" (498).

The prosecutor, in his summation, argued that petitioner had been lying when he claimed he could not remember either the questions that had been asked or the answers that he had given. Thus, after noting that Harris's trial version of the events conflicted with the testimony of each of the three prosecution witnesses, the prosecutor continued:

> "Those are the things you will have to reconcile. Those are the things that you will have to evaluate to determine who is abusing your intelligence here. I submit to you, Ladies and Gentlemen, that this is incredible. The defendant took the stand and almost a year later, almost a year since January 4th and 6th was able to tell you and describe to you in exact minute de-

tail how Stanley did this with him and they cut it and they snorted and used this and yet when I asked him if he recalled certain questions that I asked him only an hour after his arrest, and less than (twenty-)four hours after the occurrence, I asked him if he recalls giving or being asked these questions and giving me these answers and suddenly, Ladies and Gentlemen, no, no, I am sick, I don't remember, I don't remember these questions, I don't remember these answers. I remember everything my attorney asked me about what happened on the 4th and 6th, but I don't remember questions you asked me and answers I gave you on the 6th. Ladies and Gentlemen, who is abusing your intelligence? Who has the motive here to lie?" (537-8).

The court in its charge, carefully instructed the jury:

"(I)n the course of the interrogation as to the statements purportedly given by the defendant to Mr. Facelle, which Mr. Facelle examined him about, these again, were alleged to have been taken in January 8 (*sic*) 1966, and it was elicited in cross-examination that the defendant's recollections of having given these answers and having been asked these questions, he did not recall them as they were asked by Mr. Facelle. These questions and answers go to the weight and the credibility that you give to a witness's testimony. You may take this into consideration as to whether or not he, the defendant, or any person, has made a prior inconsistent statement, you may take that into consideration into determining how much weight you attach to a witness's testimony. How believable it becomes to you under all of the circumstances; but I caution you again that this is not proof of the defendant's guilt. This goes to the weight, believability of the witness's testimony" (575; A95).

At the conclusion of the trial, the jury found petitioner guilty, under the second count in the indictment, of having sold heroin to Detective Bermudez on January 6, 1966, but were unable to agree upon a verdict under the first count. One explanation for this difference in the two verdicts is apparent. Although the evidence established that Harris had handed the glassine envelope to Detective Bermudez on January 4th and that a price of five dollars had been agreed upon, it did not conclusively resolve the question whether Harris had ever been paid. Detective Bermudez did not give Harris any money when he received the drug, nor did Harris protest or ask for his money. Detective Bermudez explained this by saying that the five dollars was the change Harris owed him on the purchase of the guitar. This must have confused the jury since at the time the guitar was purchased, Bermudez had not yet agreed to buy the glassine envelope. Moreover, when Bermudez paid for the guitar with a twenty-dollar bill and a ten-dollar bill, he did not ask Harris to give him his change. Since the jury were instructed that Harris could not be found guilty if he had acted merely as Detective Bermudez's agent, and thus without profit to himself (576-7) [see *People* v. *Steele*, 26 N.Y. 2d 526 (1970)], this unresolved ambiguity in the evidence rendered the jury unable to arrive at a verdict (591-4).

Summary of Argument

On January 7, 1966, petitioner was arrested and driven to the office of the District Attorney of Westchester County where he was questioned and a voluntary statement was obtained. At the outset of that questioning, petitioner was advised of his right to remain silent and told that anything

he did say could be used against him, but he was not advised of his right to counsel. As a result, when petitioner's trial was held in November of 1966, his voluntary question and answer statement was not used as direct evidence of his guilt on the authority of *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). However, petitioner took the witness stand in his own behalf and contradicted not only the testimony of the witnesses for the prosecution, but his own earlier voluntary statement. The prosecutor, confronted with petitioner's blatant resort to perjury, asked for and was given permission to confront petitioner with the voluntary question and answer statement petitioner had made on January 7, 1966. The jury were then instructed that this prior inconsistent statement could be used only in arriving at an assessment of the defendant's credibility. It could not be used by them as evidence that he was guilty of the crimes charged. The New York courts upheld this limited use of the statement to impeach petitioner's trial testimony on the grounds that while petitioner was entitled to have that statement excluded as evidence of his guilt, he was not entitled to exploit that exclusion as a sword to create an artificial reasonable doubt which would not otherwise have existed.

The New York rule allowing the prosecution to expose a defendant's perjury in a trial held after *Miranda* v. *Arizona*, 384 U.S. 436 (1966), through use of a prior inconsistent statement obtained before *Miranda* safeguards a vital aspect of the jury's role as a fact-finding body and does not encroach upon the defendant's privilege against self-incrimination. The jury is entitled to know that a defendant has willingly given conflicting accounts of the

events covered in his trial testimony; that knowledge is a critical tool in arriving at a correct assessment of his credibility. A rule that kept this knowledge from the jury would disastrously impair their ability to arrive at a reliable determination of the facts in issue, and would lead to an increase in the incidence of unjustified acquittals by encouraging defendants to manufacture perjurious defenses, secure in the knowledge that the prosecution will be unable to expose their perjury. That result is particularly unwarranted where, as here, the statement was clearly voluntary, and lawfully obtained under standards applicable at the time of the questioning.

Since in New York the impeaching statement is used, under limiting instructions, only to discredit the defendant's trial testimony and not to establish his guilt of the crime charged, he has not been compelled to be a witness against himself. Moreover, knowledge that he can be impeached with his prior statement if he testifies, will cause a defendant to think twice before swearing falsely. The only burden this places on the defendant's privilege to testify in his own behalf is the obligation to testify truthfully; there is no constitutional right to commit perjury.

Those courts that have held that a statement that is inadmissible under *Johnson* v. *New Jersey, supra,* cannot be used to expose a defendant's false testimony have misread this Court's opinion in *Miranda, supra.* The issue of impeachment was not before this Court in *Miranda* and that case does not silently disavow this Court's condemnation of perjury in *Walder* v. *United States,* 347 U.S. 62 (1954). The New York rule does not lead to violation of *Johnson*

v. *New Jersey*, supra; there is no substantial risk that the jury will disregard the Court's limiting instruction and use the impeaching statement as evidence of guilt. A prior inconsistent statement, unlike a co-defendant's confession, is not offered as part of the prosecution's proof of guilt and the jury is not asked to pass upon the truth or falsity of its contents. Juries do follow the instruction that their decision is to be based exclusively on the evidence admitted at trial. Moreover, the jury in this case did not disregard the Court's limiting instruction, as is evidenced by its failure to convict on the first count, the allegations of which petitioner admitted in his pre-trial statement. In any event, since the prior inconsistent statement was not obtained in violation of petitioner's right to counsel, even if juries were incapable of following a limiting instruction, the use of the statement to impeach petitioner's credibility did not violate his privilege against self-incrimination. The statement was voluntary under the traditional tests and, therefore, absent a violation of his right to counsel, there could be no violation of the Fifth Amendment attendant upon the impeachment. Selection of an appropriate date for prospective application of *Miranda* v. *Arizona*, was an exercise of this Court's discretion; it did not retroactively alter the validity of the standards under which this statement was obtained. Nor will an affirmance of petitioner's conviction encourage law enforcement agencies to violate the mandates of *Miranda*; law enforcement officials could not have deliberately refrained from complying with procedural mandates this Court had not yet announced were obligatory.

ARGUMENT

The use of a pre-*Miranda* v. *Arizona* statement in a post-*Miranda* v. *Arizona* trial to impeach a defendant's false testimony does not compel that defendant to be a witness against himself.

On January 7, 1966, following his arrest on a charge of selling heroin, the petitioner was brought to the Office of the District Attorney of Westchester County, and questioned by Thomas Facelle, an assistant district attorney, and a statement was obtained. The transcript of that questioning reveals that the petitioner admitted to Mr. Facelle that he had twice secured drugs for Detective Bermudez, on January 4 and 6, of 1966, respectively; only his account of the January 4th transaction was truthful. During that questioning, the procedural safeguards subsequently laid down by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were not followed. The petitioner was advised that he had a right to remain silent and that anything he did say could be used against him,* but he was not informed that he had a right to consult with an attorney. Shortly after peti-

* The typewritten copy of the question-and-answer statement reveals that at the outset of this questioning Mr. Facelle, after identifying the other people present and formally obtaining the petitioner's true name and address, inquired:

"Any question in your mind that you don't have to talk to us if you don't want to? A. No.

"Q. If you do talk to us, you are going to tell us the truth, is that right? A. Yes.

"Q. And if you talk to us and you tell us the truth, you know it can be used against you? A. Uh huh.

"Q. No question about that in your mind is there? A. (Witness shakes head no.)

"Q. Are you going to tell us the truth? A. Yes. I'm going to tell you what I know.

"Q. And what you know is the truth? A. Yes.

"Q. All right. A. From my point of view" (A72-3).

tioner had begun to make admissions as to his involvement, however, he refused to answer any further questions because his responses were being stenographically recorded, and announced, "I'd rather see a lawyer before I keep on." Mr. Facelle replied that petitioner was entitled to consult with an attorney and inquired if petitioner would like "to call one up now." Petitioner answered that he wanted to wait until the morning. However, upon learning that he was charged with selling narcotics, petitioner changed his mind and offered to answer Mr. Facelle's questions (Exh. 6 for ident.; A74-5).* Thus, although the statement was made voluntarily the initial failure to give petitioner timely advice about his right to consult with an attorney did not meet the standards of *Miranda*. Therefore, when this case was tried, in November of 1966, this voluntary question-and-answer statement was not introduced on the People's direct case as evidence of guilt under the authority of this Court's decision in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

Petitioner, however, took the witness stand and testified in his own behalf. In his trial testimony, petitioner went beyond merely denying that he had sold narcotics to Detective Bermudez on January 4 and 6, 1966, and, in an attempt to deceive the jury, petitioner affirmatively resorted to perjury. Contradicting each detail attested to by Bermudez, petitioner swore that the detective had twice begged him to purchase narcotics for him. However, petitioner had not been able to perform this service because there was a "panic" on and there were no narcotics available anywhere.

* At the conclusion of the interview, Harris was asked whether it was "your own decision to talk after you wanted a lawyer?" When the question had been explained to him he answered it "Yes" (A78).

Indeed, petitioner, who was addicted to heroin, had informed Bermudez that he himself was reduced to drinking a cough medicine containing codeine in order to satisfy his own craving for narcotics. However, on January 6, when confronted again with the detective's urgent pleadings and his unwillingness to accept the fact that there was no heroin available to be purchased, Harris had fallen in with a friend's scheme to cheat Bermudez. Harris had accompanied this friend, Henry Stanley, to Stanley's home where, after experimenting with the effect of various substances when "snorted," Stanley had placed baking powder in two empty glassine envelopes that had originally contained heroin. The two envelopes of baking powder were then sold to Detective Bermudez as heroin.

In order to reveal to the jury that this testimony was false, the prosecutor sought to confront Harris with the statement he had made on January 7, 1966. Defense counsel, citing *Miranda* v. *Arizona*, *supra*, objected to the prosecutor's disclosing the existence of this confession. His objection was overruled on the authority of *People* v. *Kulis*, 18 N.Y.2d 318 (1966), and, for the sole purpose of impeaching petitioner's credibility, the prosecutor was permitted to cross-examine Harris concerning this prior inconsistent statement.*

On appeal to the New York courts, petitioner renewed his trial objection that, as a result of the trial court's ruling,

* Although in his direct testimony Harris had purported to remember in detail the substance of his conversations with Detective Bermudez occurring in mid-December of 1965, and again on January 4 and 6 of 1966, during cross-examination he professed himself unable to recall the answers he had given to Mr. Facelle on January 7, 1966, owing to a "slight concussion" allegedly sustained four years earlier.

the jury had been permitted to hear his question-and-answer statement. The thrust of his argument was that since the question-and-answer statement could not be used as evidence of his guilt, it could not be used in an attempt to impeach his credibility as a witness. The Court of Appeals, adhering to its adoption in *People* v. *Kulis, supra*, of this Court's rationale in *Walder* v. *United States*, 347 U.S. 62 (1954), rejected petitioner's argument and affirmed the conviction. The court's reason for arriving at that result is sound. This limited use of the question-and-answer statement did not violate petitioner's privilege against self-incrimination. The statement was not used in any way to incriminate petitioner, it was used only to discredit his trial testimony.

Petitioner's statement could not be introduced as evidence of his guilt because his trial was held after the date of this Court's decision in *Miranda* v. *Arizona*, *supra* [*Johnson* v. *New Jersey*, 384 U.S. 719 (1966)]. But when the petitioner took the witness stand and affirmatively resorted to perjury, no vital interest would have been furthered by forbidding the prosecution to disclose the existence of that statement:

> "[W]hen an accused undertakes by his own sworn testimony to establish facts which would negative or refute his participation in the crime charged, the protection against the use of statements given to police without due regard to constitutional privilege should not close off inquiry.
>
> "In effect the constitutional privilege ought to shield a man against unfairness by the State in using such a statement in his prosecution, but should not immunize him from inquiry when he affirmatively prof-

fers testimony as part of a strategy in contested litigation in which truth is a critical ingredient." *People* v. *Johnson*, 27 N.Y.2d 119, 122 (1970).

This Court has said that the "prime purpose" of the procedural safeguards set forth in *Miranda* "is to guarantee full effectuation of the privilege against self-incrimination." *Johnson* v. *New Jersey*, *supra*, at 729. And that purpose was effectually accomplished at petitioner's trial by excluding his question-and-answer statement as evidence of his guilt. But the petitioner had no additional right to exploit this constitutional benefit as a sword and commit perjury. It is in order to remove this weapon from a defendant's hands that New York permits the prosecution to expose a defendant's perjury by using evidence that is unavailable as part of the direct case.

The acceptance of this rationale by the New York Court of Appeals protects and preserves a crucial aspect of the jury's role as a fact finding body: its ability to assess accurately the credibility of witnesses. The vital importance attached to safeguarding that role is, of course, not open to question. For, as this Court has said: "one of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses," *Berger* v. *California*, 391 U.S. 314, 315 (1969), an importance which is not diminished because the witness whose credibility is to be assessed is also a defendant in the trial.

The knowledge that a witness has previously given an account of an event different from the one to which he has sworn at trial is a critical tool in enabling the jury to arrive at a correct assessment of his credibility. [See for example,

Jenks v. *United States*, 353 U.S. 657 (1957) (permitting the government to withhold prior statements if there is a vital interest in preserving their secrecy, but only at the price of freeing the defendant).] There is a direct relationship between a witness's willingness to assert conflicting accounts of an event and the likelihood that his trial version is untruthful. For this reason, the existence of a prior inconsistent statement is an objective, reliable, guide to the correct assessment of his credibility. There is, in fact, no other technique of cross-examination more effective in the exposing of false testimony than confronting a witness with his own prior inconsistent statement.

Conversely, a disavowal of the *Walder* rationale will have a disastrous effect on the jury's ability to arrive at a correct assessment of the defendant's credibility. And this will occur in exact proportion to the importance of the prior inconsistent statement to the individual defendant's credibility. In turn, by reducing the likelihood that the jury can correctly assess the defendant's credibility, it will obstruct the jury's ability to arrive at a reliable determination of the facts in issue through a resolution of conflicting versions of the events. Therefore, if the existence of a prior inconsistent statement is not revealed to the jury, there is a substantial risk that the ultimate finding of fact will be based on a distorted perception of reality. Justice will not be done.

In addition to obstructing the search for truth, a decision by this Court forbidding the impeachment of a defendant who has given false testimony will increase the incidence of guilty defendants who are acquitted. Only in this case the acquittal will not be the result of an insufficiency in the

People's proof but of an unexposed falsity in the defendant's proof. If the jury may not be informed of material in the State's possession that discredits the defendant's trial version of the facts, this will often enable the defendant to create artificially a reasonable doubt as to his guilt. For although the defendant's demeanor on the witness stand may not convince the jury of the existence of the facts proposed by his trial testimony, they would be warranted in voting an acquittal in the absence of impeachment if the existence of those facts is not inherently improbable. Thus if impeachment were to be proscribed on the grounds that whenever a prior inconsistent statement may not be used as direct evidence of guilt it cannot be used at all, this would leave the jury with a defense-manufactured reasonable doubt which would not otherwise exist. Such a rule could only encourage defendants to commit perjury.

Petitioner does not acknowledge the existence of this problem. He argues that the rule adopted by New York "disproportionately places a higher priority upon frustrating an alleged liar than upon vindicating fundamental constitutional rights" (brief, p. 15). On the contrary. Aside from the fact that discouraging perjury should be considered of great value in the administration of justice, the New York rule safeguards the jury's ability to assess the credibility of a defendant who testifies, without impinging upon the substantial rights of any accused. The flaw in petitioner's argument lies in his premise that unless an accused is free to testify falsely he will be unable to testify at all. Permitting a defendant to be impeached with a prior inconsistent statement that is unavailable as part of the State's direct case does not confront a defendant with a "choice," still less an "impermissible

choice between the constitutional right to testify and the privilege against self-incrimination" (brief, p. 16). There is no question of a "choice" because the existence of the prior inconsistent statement is not made known to the jury unless a defendant affirmatively resorts to perjury. See *People* v. *Goldman*, 21 N.Y.2d 152 (1967), *appeal dismissed for want of a substantial federal question, sub nom. Goldman* v. *New York*, 392 U.S. 643 (1968), reh. den. 393 U.S. 643 (1968). The assumption underlying our system of justice is that a defendant who exercises his privilege of testifying in his own behalf does so because he desires to tell the truth.

In permitting the prosecution to impeach a defendant who has attempted to deceive the jury with false testimony, the Court of Appeals has not encroached upon the defendant's privilege against self-incrimination. The impeaching statement is used for one or both of two purposes, each of which is aimed exclusively at discrediting the defendant's trial testimony and neither use compels the defendant "to be a witness against himself." The statement is used either to show that the defendant is not a truthful witness since he has given a different account on an earlier occasion, or it is used, with negative effect, to cast doubt upon the existence of the specific facts proposed by his trial testimony. The significance of a prior inconsistent statement to the jury lies in the defendant's willingness to give conflicting accounts of the events. The impact of this knowledge on the jury's deliberations does not depend on which version of the event is true, but only upon the fact that the earlier statement contradicts the defendant's sworn testimony.*

* The prior statement must conflict with the defendant's trial testimony. An equivocal statement would not be admissible for impeachment purposes.

In fact, it is far more damaging to the defendant's credibility when the prior statement is false, as was petitioner's account of the second sale, than when it is true, and far harder for the defendant to explain away the inconsistency. Neither method of impeachment encroaches upon the privilege against self-incrimination because the statement is not offered for, and the jury is not asked to pass upon, the truth of the contents of the prior statement. It is only when the contents of the prior inconsistent statement are used affirmatively to establish guilt that a defendant has been compelled to be a witness against himself.* Moreover, the distinction between using a statement to negative the existence of facts proposed by a defendant through his testimony and using a statement affirmatively to establish the existence of facts proposed by the prosecution's witnesses is easy to understand, and needs no clarification. It is a distinction that is in accordance with common sense, and, therefore, jurys are easily able to understand and follow instructions that are based upon it.

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* On one occasion while cross-examining petitioner about the first part of his prior statement, which concerned the first sale, the prosecutor inquired:

"Q. You recall those questions and answers? A. I think I do.

"Q. Were they true when you told them to me, within an hour or so after you were arrested? A. I couldn't say whether they were true or not.

"Q. You could not say whether they were true or not? A. Because I—, my joints was down and I needed drugs.

"Mr. Facelle: If your Honor please, may we have the witness answer?

"The Court: No, the witness answered. He said that I can't tell you whether they were true or not. He has answered" (450; A59).

The prosecutor's reference to truth was not repeated and had no effect on the outcome. Petitioner did not acknowledge the truth of his statement, the court told the jury that his statement was not to be considered for its truth, and he was not convicted under the count to which the reference related.

The fact that the adoption of the *Walder* rationale by the New York Court of Appeals will lead a defendant to think twice before swearing falsely does not, contrary to petitioner's contention (brief, p. 16), place an unconstitutional "condition" on the exercise of his privilege to testify in his own behalf. The right of every defendant in New York to appear as a "witness" in his own behalf is unconditional. There is no constitutional right to commit perjury. *Bryson* v. *United States*, 396 U.S. 64 (1969); *United States* v. *Knox*, 396 U.S. 77 (1969). Once a defendant is sworn as a witness he is under an obligation to testify truthfully. If he violates that obligation he is not in a position to complain because his previously excluded statement is used to expose the fact that his trial testimony is false. Nor does the exercise of a defendant's right to appear as a "witness" in his own behalf need that kind of a fence around it. Leaving the prosecution free to use an inadmissible statement to discredit false testimony will have the effect of discouraging perjury. The only defendants who will be forced to hesitate before testifying will be those who, like Viven Harris, desire to testify falsely.

This Court's recent decisions eliminating the possibility that a defendant will be deterred from asserting his constitutional rights through fear that the State will then be able to use his testimony against him do not impinge upon the sound policy underlying the New York rule. In *Simmons* v. *United States*, 390 U.S. 377 (1968) and in *Harrison* v. *United States*, 392 U.S. 219 (1968), the testimony deemed unconstitutionally compelled was used by the prosecution as part of its direct case to establish the defendant's guilt. Use of a prior inconsistent statement to impeach direct testimony undermines a defendant's credibility

as a witness; and is not used to establish his guilt. Thus in *Simmons* and in *Harrison*, unlike the case now before this Court, constitutionally defective proof was admitted as part of the case against the defendant. In this case, the contested evidence was used during cross-examination to impeach the defendant's direct testimony.

Petitioner also contends that in *Walder* this Court "failed to distinguish between irrelevant and inadmissible evidence" (brief, p. 12, fn). Evidently petitioner has been confused by the fact that Walder was not being tried on a charge of possessing the narcotics that were used to impeach his trial testimony. That fact did not render the impeaching material "irrelevant"; it related directly to his trial testimony. The thrust of Walder's defense was that he could not have sold narcotics on this occasion because he had never had narcotics in his possession on any occasion. Thus the fact that narcotics had been found in his home on an earlier occasion, albeit illegally, was probative to an assessment of his credibility as a witness. That the indictment did not stem from that possession did not go to the heart of the rationale behind permitting impeachment. The use of this material was approved, not because it was "collateral" to the prosecution's case but because it was probative in assessing the truthfulness of the defendant's case.

Petitioner also claims error in that his prior inconsistent statement related directly to the crime charged (brief, p. 20). Other than barring the use of a collateral statement on the grounds of remoteness, there is no valid distinction for impeachment purposes between a statement concerning the essential elements of the crime charged and a statement

dealing with collateral matters. A rule proscribing use of a statement directly related to the crime charged cannot be justified in terms of the rationale of *Walder*. Indeed, prior inconsistent statements on material matters are more worthy of admissibility than statements on collateral matters when credibility is in issue at a trial. Moreover, a distinction based on that ground is not consistent with this Court's opinion in *Walder*. Given the facts of *Walder*, the prior possession of heroin could not have been used as impeaching material if Walder had merely denied "all the elements of the case against him" [*Walder* v. *United States*, 347 U.S. at 65], because it would only have established that he was a person who had a tendency to commit the crime charged. It was not available as evidence of bad character since, by definition, Walder could not be accused of having committed the earlier crime. It acquired probative value, however, when Walder conveyed to the jury his defense that he had never possessed heroin on any occasion. If, as one court has held [*Blair* v. *United States*,* 401 F.2d 387 (D.C. Cir. 1968); see also, *Johnson* v. *United States*, 344 F.2d 163 (D.C. Cir. 1964)], a defendant is free to create a false alibi defense "without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it" [*Walder* v. *United States*, *supra*, at 65], then only the result of *Walder* still stands, the rationale has been destroyed.

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* *Curry* v. *United States*, 358 F.2d 904 (2d Cir. 1966), is not in point. There the government was permitted, in the interests of truth, to "use this illegally obtained evidence *to establish facts* collateral to the ultimate issue of guilt" (*Id.* at 910) (emphasis supplied). Under the New York rule, however, the impeaching statement cannot be used to establish the facts contained in it, only its existence may be independently established.

Petitioner contends that "inherent in the rationale" permitting impeachment is the "suggestion" that he lied either at the trial or when making the statement and "[t]his is a completely impermissible consideration in determining constitutionality of such a statement" (brief, p. 18). That is not the rationale behind impeachment. A defendant's prior inconsistent statement is probative in testing the veracity of his trial testimony, provided that the inconsistency relates to that testimony and is not remote. It is for the jury, not the trial court, to decide whether the defendant was lying when he testified. If the statement is probative to an assessment of the defendant's credibility, the State is not required to establish beyond a reasonable doubt that the defendant's trial testimony was false before being allowed to use the prior statement to impeach him. The ultimate aim is that if the defendant is lying he will not be able to conceal that fact by hiding behind the exclusion of the statement as evidence in chief. And in this case it is plain that the jury did not find the petitioner to be a truthful witness.* If the jury had accepted the facts proposed by petitioner he would have been acquitted on both counts; he was not. In fact, during the sentencing

* Respondent concludes that the jury must have believed Harris's denial that he sold drugs on January 4th. [He argues (brief, p. 32) that the impeachment must have "failed" "for by their disposition of the first count the jury almost expressly stated that they could not brand his testimony as false."] That surprising assertion is based on an incorrect analysis of the effect on the jury's deliberations when they conclude that a defendant has lied. The jury cannot find that a defendant committed the crime charged merely because his testimony denying it is false. They must be satisfied of his guilt, beyond a reasonable doubt, based on the evidence and a lie is not evidence of anything. A false denial cannot be used as evidence tending to establish the existence of the fact denied. A jury must acquit a defendant found to be a liar when there is insufficient evidence tending to establish his guilt. And that is what left the jury unable to agree in the case at bar.

proceedings, the trial court was moved to comment upon petitioner's deliberate attempt to deceive the jury by lying on the witness stand (minutes of sentencing, pp. 5-6). Even Mr. McHugh, an associate of petitioner's trial counsel who represented Harris at sentencing, conceded that petitioner had committed perjury:

> "He has come under the influence of John Smith and other jailhouse lawyers who are there, who are putting these people up to these things. He had some notes in his possession from John Smith and I think, Your Honor, without judging his testimony since I didn't hear all of it, that if, and Your Honor certainly did, and I bow to Your Honor's characterization of it, but he said things and did things in the trial and on the stand which were improper, and I certainly think they were, that he did it in mitigation, I may say, because he chose to listen to the advice of some of these jailhouse lawyers" (*id.* at p. 8).

The New York courts have applied this rationale in situations far more compelling than the one confronting this Court in *Walder* v. *United States, supra.* In *Walder*, the police conduct was unlawful at the time it was engaged in; here, no constitutional infirmity attended the obtaining of this statement. See also *People* v. *Kulis*, 18 N.Y.2d 318 (1966); *People* v. *Miles*, 23 N.Y.2d 527 (1969); *People* v. *Boodie*, 26 N.Y.2d 779 (1970); *People* v. *Hudson*, 26 N.Y. 2d 781 (1970); *People* v. *Johnson*, 27 N.Y.2d 119 (1970). On January 7, 1966, when Assistant District Attorney Facelle questioned petitioner there was no requirement that a suspect be advised of his right to have counsel present or that if he could not afford counsel one would be provided for him. These warnings were not made obligatory by this

Court until June 13, 1966, six months after the questioning of petitioner. Indeed, this good faith reliance on the absence of procedural mandates was the decisive factor in convincing this Court that its rulings in *Miranda* v. *Arizona*, *supra*, should be denied retroactive effect:

> "Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege." *Johnson* v. *New Jersey*, 384 U.S. 719, 732-3 (1966) *supra*.

However, "in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted" [*Jenkins* v. *Delaware*, 395 U.S. 213, 219 (1969)], this Court bypassed the more reasonable date for prospective application—the date of questioning [*Desist* v. *United States*, 394 U.S. 244 (1969); *Stovall* v. *Denno*, 388 U.S. 293 (1967)]—and selected the date on which the trial commenced. Since the rationale dictating prospective application was the reasonable reliance by law enforcement agencies upon the law existing at the time of the interrogation, rejection of the date of reliance inevitably produced an arbitrary result. Voluntary statements obtained in good faith reliance on standards this Court had "expressly declined to condemn" [*Johnson* v. *New Jersey*, *supra*, at 731] were nevertheless unavailable as evidence in chief if the trial had not yet commenced when the new procedural safeguards were announced.

In the end, a decision designed to secure future compliance and expressly excusing prior failure to comply had the unintended effect of penalizing conduct deemed constitutional at the time it occurred. Unfortunately, in a limited class of cases where other evidence in chief was available to the prosecution, certain defendants, including the petitioner in this case, not content with this Court's discretionary extension of the benefits of *Miranda* to them, took the witness stand and attempted to secure an acquittal by means of a manufactured defense. That reliance on perjury should not be rewarded by extending the protection of *Johnson* beyond its original purpose of benefiting a defendant whose statement was obtained prior to June 12, 1966, by excluding it as proof of guilt. Just as society has a "legitimate concern that convictions already validly obtained not be needlessly aborted," [*Jenkins* v. *Delaware*, *supra*], so it has an equally compelling interest in using a validly obtained confession to prevent a defendant from securing an acquittal by resorting to perjury.

Throughout the country, as petitioner has pointed out (brief, pp. 12-15), a number of state and federal courts have concluded that in *Miranda* this Court condemned impeachment [*Blair* v. *United States*, *supra*, 401 F.2d 387 (D.C. Cir. 1968); *Proctor* v. *United States*, 404 F.2d 819 (D.C. Cir 1968); *Groshart* v. *United States*, 392 U.S. 172 (9th Cir. 1968); *United States* v. *Fox*, 403 F.2d 97 (2d Cir. 1968); *Commonwealth* v. *Padgett*, 428 Pa. 229, 237 A.2d 209 (1968) (dicta); *Commonwealth* v. *Robinson*, 428 Pa. 458, 239 A.2d 308 (1968); *People* v. *Marsh*, 14 Mich. App. 518, 165 N.W.2d 853, 859 (1968); *State* v. *Galasso*, 217 So.2d 326 (Fla. 1968); *Franklin* v. *State*, 6 Md. App. 572, 252 A.2d

487 (1969)]. Those courts were wrong. They were confused by the occurrence of the word "impeach" in a single passage that dealt only with why no distinction would be drawn when excluding evidence of guilt between statements that are inculpatory and statements that are exculpatory. As the language employed in that passage demonstrates, this Court was considering the use of a statement, whether inculpatory or exculpatory, to establish guilt regardless whether that use occurred in the direct case or during cross-examination. That passage contains no reference to the use of a statement to test credibility, it is confined to the question of the admissibility of statements as evidence of guilt:

> "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any

> other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself." *Miranda* v. *Arizona*, 384 U.S. 436, 476-7.

Unlike those courts that have rejected impeachment because of this one passage without even considering the sound policy behind permitting the prosecution to discredit perjury, this Court is under no compulsion to regard the issue as settled. The question of cross-examining a defendant was not before this Court in *Miranda*. And not once in the course of that opinion was any mention made of this Court's decision in *Walder* v. *United States, supra*. Surely it is not customary for this Court to overrule its own decisions without adverting to that fact. Moreover, an acceptance of petitioner's reading of that passage would treat this Court's dicta in *Miranda* as broader than the holding. *Miranda* is confined to statements obtained without the procedural safeguards; *Walder*, on the other hand, extends to all material that is unavailable as evidence in chief, regardless of the reason for its exclusion.

There is a crucial difference between the effect of barring cross-examination of a defendant and the effect of excluding direct evidence of his guilt. The jury has no function to perform with respect to direct evidence that has been excluded, whether the reason for the exclusion was constitutional, as in this case, or evidentiary. And while this may cause the jury to decide that there is insufficient evidence tending to establish a fact in issue, it does not alter the jury's ability to arrive at a reliable finding based on the evidence before it. In contrast, the jury does have a function to perform when a witness has testified to a pro-

posed set of facts. They must decide whether the witness is a reliable proponent of those facts. Therefore, while excluding direct evidence only affects the jury's ability to know all of the facts, whether relevant or not, barring impeaching evidence undermines the jury's ability to correctly assess credibility and thus to reliably determine the facts in issue.

Petitioner, drawing false comfort from *Bruton* v. *United States*, 391 U.S. 123 (1968), disputes this analysis. He argues that the jury will treat the prior inconsistent statement as direct evidence of guilt if this Court adopts the New York rule permitting impeachment. His response is not persuasive. The use of a defendant's prior inconsistent statement to discredit his trial testimony, unlike the introduction of a co-defendant's confession, does not create a "substantial risk that the jury, despite instructions to the contrary, [will look] to the incriminating extrajudicial statements in determining [the defendant's] guilt" [*Bruton* v. *United States*, *supra*, at 123]. The impeaching statement, in contrast to a co-defendant's confession, is not introduced as direct evidence of guilt and the jury is not asked to consider the truth or falsity of the assertions contained in it. The jury is permitted to hear the prior inconsistent statement for the exclusive purpose of determining the weight and credibility which they should attach to the testimony given by the defendant from the witness stand. The significance of the existence of an earlier conflicting statement to their assessment of the defendant's trial testimony will be readily apparent to the jury and this will render it easy for them, if they conclude that the defendant did, in fact, make the earlier statement, to use the statement only when

they are evaluating the truthfulness of his sworn testimony. Thus, where a statement is used to impeach a defendant, clear and forceful limiting instructions will be adequate to insure that the jury uses the statement only for the purpose of assessing the defendant's credibility. An analogous situation arose in *Frazier* v. *Cupp*, 394 U.S. 731 (1969), when the prosecutor outlined the testimony of a witness during his opening statement. That opening statement was not evidence of the defendant's guilt and the subsequent non-appearance of the witness did not create a substantial risk that the jury would disregard the court's instructions.

An entirely different situation is presented when a co-defendant's confession implicating the defendant is introduced at their joint trial. The co-defendant's confession is admitted as part of the prosecution's proof that the co-defendant is guilty and it is offered for the truth of its contents. Thus, the jury is actually required, as part of their deliberations, to pass upon the accuracy and reliability of the co-defendant's confession. It is this which creates the substantial risk that the jury will be unable to follow an instruction limiting this evidence to the question of the co-defendant's guilt. For having decided that the statement is truthful they are then asked to wipe from their minds that portion of the truthful narrative which implicates the defendant. No similar difficulty confronts the jury under the New York rule permitting impeachment. The prior inconsistent statement is not used to establish the defendant's guilt and it is not offered for the truth of its contents. Thus, the statement is not part of the evidence in the case and the jury is not required to determine

whether or not it contains an accurate recitation of the facts. It is a cornerstone of the jury system that jurors can and do follow the instruction that they arrive at their decision solely on the basis of the evidence actually admitted at the trial:

> "Even if it is unreasonable to assume that a jury can disregard a co-conspirator's statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial." *Frazier* v. *Cupp*, 394 U.S. 731, 736 (1969).

Indeed, petitioner's trial demonstrates that juries are able to follow an instruction limiting their use of a prior inconsistent statement. For, Harris's statement contains a confession that he had sold drugs to Detective Bermudez on January 4th, and if the jury had not followed the court's instructions, they would have found him guilty of that act.

Moreover, even if the jury had not proved capable of abiding by the court's limiting instructions, the use of petitioner's statement would not have violated his privilege against self-incrimination. That statement was not obtained under circumstances which violated either the traditional test of voluntariness or the petitioner's right to counsel. Consequently, it cannot be regarded as an "involuntary" statement within the meaning of the privilege. The subsequently announced right to have access to an attorney during any in-custody questioning is a fence erected around the privilege in order to safeguard it. A suspect must be informed about his right to counsel, under *Miranda*, not because it is essential that a lawyer be present

in the station house on all occasions but because it is essential that a suspect understand that he does not have to respond to questioning unless he wants to and appreciates the consequences if he does decide to answer questions. That fence around the privilege had not yet been erected, however, when petitioner's question and answer statement was taken; it was not erected until *Miranda* was decided. Therefore, the fact that petitioner was not informed of his right to have counsel present during the questioning did not render the statement "involuntary" at the time of his trial. It was excluded as evidence of guilt on the People's case because it was inadmissible under *Miranda* and *Johnson*, not because it was involuntary or in any sense "compelled." The selection of an appropriate date for prospective application was an exercise of discretion, and was not constitutionally compelled.

Petitioner further claims that under the New York rule a defendant is deprived of an opportunity to test the voluntariness of a statement used only for impeachment purposes; this claim is based on an incorrect view of New York law. He has confused a pre-trial "Huntley" hearing as to a statement used on the People's case and a voir dire testing admissibility of a statement used to impeach as respondent's brief shows. Under New York procedure a defendant who is objecting to this use of his statement may request a voir dire to establish the circumstances under which it was obtained. At his election, the voir dire may be held in the absence or in the presence of the jury. When the voir dire has ended the trial court, in the exercise of its discretion to control the scope of cross-examination, will rule on whether the statement may be used for impeach-

ment purposes. Thus, for example, if on the voir dire the defendant establishes that the statement was extracted from him through the application of physical force, the trial court would not permit the State to use the statement for impeachment purposes; a situation not, of course, present in this case.*

To counterbalance the undeniable need for a full and searching inquiry into a defendant's credibility as a witness, petitioner only speculates as to the effect the New York rule may have on the future course of in-custody questioning. He argues that the New York rule "encourages [law enforcement officials] to flagrantly violate" the procedural safeguards mandated in *Miranda* "in the hope that the fruits of such violations will be rewarded" when, at the subsequent trial, the accused takes the stand in his own behalf, or declines to testify for fear of impeachment by his prior statement. This speculation is inappropriate in the present context. The statement used to impeach petitioner was obtained before *Miranda*, thus acceptance of the New York rule on the facts of this case cannot have the effect of altering past conduct since law enforcement officials could not have deliberately refrained from employing specific safeguards that this Court had not yet announced were obligatory upon them. Nor will allowing this

* A confession extracted through physical or psychological force cannot be used as a prior inconsistent statement because it offends our sense of justice. And, by definition, a coerced confession is not one the defendant was willing to make, consequently it has no probative value in assessing his credibility. The prosecution cannot be heard to say the defendant has been willing to give different accounts of the same event when the State has extracted the account on one of those separate occasions. An involuntary statement may also be untruthful but that is not a factor in the decision to disallow its use; the statement is not offered for the truth of its contents.

use in cases where the suspect was questioned after *Miranda* encourage law enforcement officials who are presently conducting investigations to wilfully violate the specific mandates of *Miranda*. Indeed, there is not one fact in the record or in petitioner's brief to support the speculation that law-enforcement officials will deliberately defy this Court's mandate unless they are aware that even if a defendant resorts to perjury at his subsequent trial the State will not be able to use the statement thus obtained. The technique of impeachment during cross-examination was not devised in response to this Court's decision in *Miranda*. The question whether to permit a defendant to be impeached by a prior statement which is inadmissible on the State's direct case did not arise as a result of *Miranda* and a rule prohibiting impeachment in this case will not be confined to statements that are inadmissible because they were not obtained in compliance with the procedural safeguards mandated in *Miranda*. Nor has it ever been suggested that permitting impeachment in pre-*Miranda* cases had the effect of encouraging police officers to engage in illegal conduct.

What petitioner fears is not a fact but a risk. Viewed in that light, there may be a risk that an individual police officer, indifferent to the fact that his questioning will not result in a statement admissible in court, is so devious that he questions a suspect for the sole purpose of providing material to impeach the suspect if the case does not result in a plea of guilty and if the suspect takes the stand in his own behalf. But the ordinary aim of questioning is to discover the truth of the suspect's involvement in the crime and the average police officer in this country is too busy to indulge in the absurdity of questioning suspects in the hope

that the results of that questioning will be useful if the suspect should decide at a later date not to tell the truth when he testifies. And of course, the alleged risk is not involved in this case, since the investigators acted properly under the standards applicable at the time.

Conclusion

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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October, 1970

OPINION

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HARRIS *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 206. Argued December 17, 1970—Decided February 24, 1971

Statement inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by *Miranda* v. *Arizona*, 384 U. S. 436, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of defendant's trial testimony. See *Walder* v. *United States*, 347 U. S. 62. Pp. 2–4.

25 N. Y. 2d 175, 250 N. E. 2d 349, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which HARLAN, STEWART, WHITE, and BLACKMUN, JJ., joined. BLACK, J., dissented. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 206.—October Term, 1970

Viven Harris, Petitioner, v. State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[February 24, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted the writ in this case to consider petitioner's claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution's case in chief under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), may not be used to impeach his credibility.

The State of New York charged petitioner in a two-count indictment with twice selling heroin to an undercover police officer. At a subsequent jury trial the officer was the State's chief witness, and he testified as to details of the two sales. A second officer verified collateral details of the sales, and a third offered testimony about the chemical analysis of the heroin.

Petitioner took the stand in his own defense. He admitted knowing the undercover police officer but denied a sale on January 4. He admitted making a sale of contents of a glassine bag to the officer on January 6 but claimed it was baking powder and part of a scheme to defraud the purchaser.

On cross-examination petitioner was asked seriatim whether he had made specified statements to the police immediately following his arrest on January 7—statements that partially contradicted petitioner's direct testimony at trial. In response to the cross-examination,

petitioner testified that he could not remember virtually any of the questions or answers recited by the prosecutor. At request of petitioner's counsel the written statement from which the prosecutor had read questions and answers in his impeaching process was placed in the record for possible use on appeal; the statement was not shown to the jury.

The trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt. In closing summations both counsel argued the substance of the impeaching statements. The jury then found petitioner guilty of the second count of the indictment.[1] The New York Court of Appeals affirmed in a *per curiam* opinion, 25 N. Y. 2d 175, 250 N. E. 2d 349 (1969).

At trial the prosecution made no effort in its case in chief to use the statements allegedly made by petitioner, conceding that they were inadmissible under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The transcript of the interrogation used in the impeachment, but not given to the jury, shows that no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. Petitioner makes no claim that the statements made to the police were coerced or involuntary.

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effec-

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[1] No agreement was reached as to the first count. That count was later dropped by the State.

tively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

In *Walder* v. *United States*, 347 U. S. 62 (1954), the Court permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes.

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.
>
> ". . . [T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U. S., at 65.

It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in *Walder*. The conflict between petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged

thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See *United States* v. *Knox*, 396 U. S. 77 (1969); cf. *Dennis* v. *United States*, 384 U. S. 855 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.[2] Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Affirmed.

MR. JUSTICE BLACK dissents.

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[2] If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a "fruit" of his confession, free from confrontation with his prior statements and acts. The voluntariness of the confession would, on this thesis, be totally irrelevant. We reject such an extravagant extension of the Constitution. Compare *Killough* v. *United States*, 114 U. S. App. D. C. 305, 315 F. 2d 241 (CADC 1962).

SUPREME COURT OF THE UNITED STATES

No. 206.—October Term, 1970

Viven Harris, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of New York.

[February 24, 1971]

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

It is conceded that the question-and-answer statement used to impeach petitioner's direct testimony was, under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), constitutionally inadmissible as part of the State's direct case against petitioner. I think that the Constitution also denied the State the use of the statement on cross-examination to impeach the credibility of petitioner's testimony given in his own defense. The decision in *Walder* v. *United States*, 347 U. S. 62 (1954), is not, as the Court today holds, dispositive to the contrary. Rather, that case supports my conclusion.

The State's case against Harris depended upon the jury's belief of the testimony of the undercover agent that petitioner "sold" the officer heroin on January 4 and again on January 6. Petitioner took the stand and flatly denied having sold anything to the officer on January 4. He countered the officer's testimony as to the January 6 sale with testimony that he had sold the officer two glassine bags containing what appeared to be heroin, but that actually the bags contained only baking powder intended to deceive the officer in order to obtain $12. The statement contradicted petitioner's direct testimony as to the events of both days. The statement's version of the events on January 4 was that the officer had used petitioner as a middleman to buy some heroin from a

third person with money furnished by the officer. The version of the events on January 6 was that petitioner had again acted for the officer in buying two bags of heroin from a third person for which petitioner received $12 and a part of the heroin. Thus, it is clear that the statement was used to impeach petitioner's direct testimony not on collateral matters but on matters directly related to the crimes for which he was on trial.[1]

Walder v. *United States* was not a case where tainted evidence was used to impeach an accused's direct testimony on matters directly related to the case against him. In *Walder* the evidence was used to impeach the accused's testimony on matters *collateral* to the crime charged. Walder had been indicted in 1950 for purchasing and possessing heroin. When his motion to suppress use of the narcotics as illegally seized was granted, the Government dismissed the prosecution. Two years later Walder was indicted for another narcotics violation completely unrelated to the 1950 one. Testifying in his own defense, he said on direct examination, that he had never in his life possessed narcotics. On cross-examination he denied that law enforcement officers had seized narcotics from his home two years earlier. The Government was then permitted to introduce the testimony of one of the officers involved in the 1950 seizure, that when he had raided Walder's home at that time he had seized narcotics there. The Court held that on facts where "the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics," 347

[1] The trial transcript shows that petitioner testified that he remembered making a statement on January 7; that he remembered a few of the questions and answers; but that he did not "remember giving too many answers." When asked about his bad memory, petitioner, who had testified that he was a heroin addict, stated that "my joints was down and I needed drugs."

U. S., at 65, the exclusionary rule of *Weeks* v. *United States*, 232 U. S. 383 (1914), would not extend to bar the Government from rebutting this testimony with evidence, although tainted, that petitioner had in fact possessed narcotics two years before. The Court was careful, however, to distinguish the situation of an accused whose testimony, as in the instant case, was a "denial of complicity in the crimes of which he was charged," that is, where illegally obtained evidence was used to impeach the accused's direct testimony on matters directly related to the case against him. As to that situation, the Court said:

> "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U. S., at 65.

From this recital of facts it is clear that the evidence used for impeachment in *Walder* was related to the earlier 1950 prosecution and had no direct bearing on "the elements of the case" being tried in 1952. The evidence tended solely to impeach the credibility of the defendant's direct testimony that he had never in his life possessed heroin. But that evidence was completely unrelated to the indictment on trial and did not in any way interfere with his freedom to deny all elements of that case against him. In contrast, here, the evidence used for impeachment, a statement concerning the details of the very sales alleged in the indictment, was directly related to the case against petitioner.

While *Walder* did not identify the constitutional specifics which guarantee "a defendant the fullest opportunity to meet the accusation against him . . . [and

permit him to] be free to deny all the elements of the case against him," in my view *Miranda* v. *Arizona*, 384 U. S. 436 (1966), identified the Fifth Amendment's privilege against self-incrimination as one of those specifics.[2] That privilege has been extended against the States. *Mallоy* v. *Hogan*, 378 U. S. 1 (1964). It is fulfilled only

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[2] Three of the five judges of the Appellate Division in this case agreed that the State's use of petitioner's illegally obtained statement was an error of constitutional dimension. *People* v. *Harris*, 31 App. Div. 2d 828 (1968). However, one of the three held that the error did not play a meaningful role in the case and was therefore harmless under our decision in *Chapman* v. *California*, 386 U. S. 18 (1967). He therefore joined in affirming the conviction with the two judges who were of the view that there was no constitutional question involved. 31 App. Div. 2d, at 830. I disagree that the error was harmless and subscribe to the reasoning of the dissenting judges, *id.*, at 831–832:

"Under the circumstances outlined above, I cannot agree that this error of constitutional dimension was 'harmless beyond a reasonable doubt' (*Chapman* v. *California*, 386 U. S. 18, 24). An error is not harmless if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (*Fahy* v. *Connecticut*, 375 U. S. 85, 86–87). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (*Chapman* v. *California, supra*). Surely it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the Jan. 4 charge (cf. *Anderson* v. *Nelson*, 390 U. S. 523, 525). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's. The judgment should be reversed and a new trial granted."

The Court of Appeals affirmed *per curiam* on the authority of its earlier opinion in *People* v. *Kulis*, 18 N. Y. 2d 318, 221 N. E. 2d 541 (1966). Chief Judge Fuld and Judge Keating dissented in *Kulis* on the ground that *Miranda* precluded use of the statement for impeachment purposes, 18 N. Y. 2d, at 323, 221 N. E. 2d, at 543.

when an accused is guaranteed the right "to remain silent unless he chooses to speak in the *unfettered* exercise of his own will," *id.*, at 8 (emphasis added). The choice of whether to testify in one's own defense must therefore be "unfettered," since that choice is an exercise of the constitutional privilege, *Griffin* v. *California*, 380 U. S. 609 (1965). *Griffin* held that comment by the prosecution upon the accused's failure to take the stand or a court instruction that such silence is evidence of guilt is impermissible because it "fetters" that choice—"[i]t cuts down on the privilege by making its assertion costly." *Id.*, at 614. For precisely the same reason the constitutional guarantee forbids the prosecution from using a tainted statement to impeach the accused who takes the stand: The prosecution's use of the tainted statement "cuts down on the privilege by making its assertion costly." *Ibid.* Thus, the accused is denied an "unfettered" choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him.[3] We settled this proposition in *Miranda* where we said:

> "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner. . . . [S]tatements merely intended to be exculpatory by the defendant are often *used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*" 384 U. S., at 476–477 (emphasis added).

[3] It is therefore unnecessary for me to consider petitioner's argument that *Miranda* has overruled the narrow exception of *Walder* admitting impeaching evidence on collateral matters.

This language completely disposes of any distinction between statements used on direct as opposed to cross-examination. "An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn." *People* v. *Kulis*, 18 N. Y. 2d 318, 324, 221 N. E. 2d 541, 542 (1966) (dissenting opinion).

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The "essential mainstay" of that system, *Miranda* v. *Arizona*, 384 U. S., at 460, is the privilege against self-incrimination, which for that reason has occupied a central place in our jurisprudence since before the Nation's birth. Moreover, "we may view the historical development of the privilege as

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[4] Six federal Courts of Appeals and appellate courts of 14 States have reached the same result. *United States* v. *Fox*, 403 F. 2d 97 (CA2 1968); *United States* v. *Pinto*, 394 F. 2d 470 (CA3 1968); *Breedlove* v. *Beto*, 404 F. 2d 1019 (CA5 1969); *Groshart* v. *United States*, 392 F. 2d 172 (CA9 1968); *Blair* v. *United States*, 401 F. 2d 387 (CADC 1968); *Wheeler* v. *United States*, 382 F. 2d 998 (CA10 1968); *People* v. *Barry*, 237 Cal. App. 2d 154 (1965), cert. denied, 386 U. S. 1024 (1967); *Velarde* v. *People*, 466 P. 2d 919 (Colo. 1970); *State* v. *Galasso*, 217 So. 2d 326 (Fla. 1968); *People* v. *Luna*, 37 Ill. 2d 299, 226 N. E. 2d 586 (1967); *Franklin* v. *State*, 6 Md. App. 572, 252 A. 2d 487 (1969); *People* v. *Wilson*, 20 Mich. App. 410, 174 N. W. 2d 79 (1969); *State* v. *Turnbow*, 67 N. M. 241, 354 P. 2d 533 (1960); *State* v. *Catrett*, 276 N. C. 86, 171 S. E. 2d 398 (1970); *State* v. *Brewton*, 247 Ore. 241, 422 P. 2d 581, cert. denied, 387 U. S. 943 (1967); *Commonwealth* v. *Padgett*, 428 Pa. 229, 237 A. 2d 209 (1968); *Spann* v. *State*, 448 S. W. 2d 128 (Tex. Cr. App. 1969); *Cardwell* v. *Commonwealth*, 209 Va. 412, 164 S. E. 2d 699 (1968); *Gaertner* v. *State*, 35 Wis. 2d 159, 150 N. W. 2d 370 (1967); see also *Kelly* v. *King*, 196 So. 2d 525 (Miss. 1967). Only three state appellate courts have agreed with New York. *State* v. *Kimbrough*, 109 N. J. Super. 57, 262 A. 2d 232 (1970); *State* v. *Butler*, 19 Ohio St. 2d 55, 249 N. E. 2d 818 (1969); *State* v. *Grant*, 459 P. 2d 639 (Wash. 1969).

one which groped for the proper scope of governmental power over the citizen. . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens." *Ibid.* These values are plainly jeopardized if an exception against admission of tainted statements is made for those used for impeachment purposes. Moreover, it is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio*, 367 U. S. 643, 659 (1961). Thus, even to the extent that *Miranda* was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* can't be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution. I dissent.